89-322 (1)

No.

Supreme Court, U.S.
FILED
AUG 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

BERNARD KLEIMAN
Suite 1910
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, Pennsylvania 15222

GEORGE H. COHEN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

FREDERICK V. BETTS
PAUL D. CAREY
JAMES D. NELSON
BETTS, PATTERSON & MINES
1215 Fourth Avenue
Seattle, Washington 98164

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

21 pp

QUESTIONS PRESENTED

1. Does the federal duty of fair representation preempt a cause of action for personal injury under state tort law based upon a union's alleged negligence in administering and enforcing the safety provisions of a collective bargaining agreement?

2. Did the Idaho Supreme Court, upon reconsideration of this case in light of *IBEW v. Hechler*, 481 U.S. 851 (1987), render a decision on federal preemption under Section 301 of the Labor Management Relations Act that is contrary to this Court's decision in *Hechler*?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	25

TABLE OF AUTHORITIES

Cases	Page
Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985)	8, 24
Bache v. American Telephone & Telegraph Co., 840 F.2d 283 (1988)	16
Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981)	17
Brooks v. New Jersey Manufacturers Ins. Co., 170 N.J. Super. 20, 405 A.2d 466, *certif. denied*, 81 N.J. 413, 408 A.2d 806 (1979)	19
Bryant v. United Mine Workers, 467 F.2d (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973)	18, 19
Burgess v. Allendale Mut. Ins. Co., 111 L.R.R.M. 2997 (S.D. Ga. 1982)	19
Carollo v. Forty-Eight Insulation, Inc., 252 Pa. Super. 422, 381 A.2d 990 (1977)	19
Condon v. Local 2944, United Steelworkers of America, 683 F.2d 590 (1st Cir. 1982)	16, 19
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	10
Deshazer v. Tompkins, 89 Idaho 347, 404 P.2d 604 (1965)	12
Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)	18
Gerace v. Johns-Manville Corp., 95 L.R.R.M. 3282 (Pa. Ct. C.P. 1977), *aff'd*, 337 Pa. Super. 634, 487 A.2d 442 (1982)	19
Globig v. Johns-Manville Sales Co., 486 F. Supp. 735 (E.D. Wis. 1980)	19
Hartsfield v. Seafarers Int'l Union, 427 F. Supp. 264 (S.D. Ala. 1977)	19
Hechler v. IBEW, 772 F.2d 788 (11th Cir. 1985), *rev'd*, 481 U.S. 851 (1987)	8
Helton v. Hake, 564 S.W. 2d 313 (Mo. App.), *cert. denied*, 439 U.S. 959 (1978)	19
Higley v. Disston, 92 L.R.R.M. 2443 (Wash. Super. 1976)	19
House v. Mine Safety Appliances Co., 417 F. Supp. 939 (D. Idaho 1976), *aff'd in part and rev'd in part on other grounds*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978)	19

TABLE OF AUTHORITIES—Continued

	Page
House v. Mine Safety Appliances Co., 573 F.2d 609 (9th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978)	5
Hudson Distributors, Inc. v. Lilly, 377 U.S. 386 (1964)	10
IBEW v. Hechler, 481 U.S. 851 (1987)	2, 8, 17, 21
Johnson v. United Food & Commercial Workers Local 23, 828 F.2d 961 (3d Cir. 1987)	16
Jones v. Truck Drivers Local Union 299, 838 F.2d 856 (6th Cir. 1988)	16
Mahoney v. Chicago Pneumatic Tool Co., 111 L.R.R.M. 2839 (W.D. Mich. 1982)	19
Maynard v. Revere Copper Products, Inc., 773 F.2d 733 (6th Cir. 1985)	16
McColgan v. Mine Workers, 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, 469 U.S. 1051 (1985)	19
Michigan Mutual Ins. Co. v. United Steelworkers of America, 774 F.2d 104 (6th Cir. 1985)	24
Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)	15
Peterson v. Air Line Pilots Ass'n, 759 F.2d 1161 (4th Cir. 1985)	16
Pockalny v. Elwell Parker Elec. Co., 608 F. Supp. 570 (W.D.N.Y. 1985)	19
Preisler v. Steelworkers, No. N-83-159 (D. Conn., Feb. 24, 1984)	19
Otto v. Mell, 94 Idaho 109, 482 P.2d 84 (1971)	12
Rawson v. United Steelworkers, 726 P.2d 742 (Idaho 1986)	23
Richardson v. United Steelworkers of America, 864 F.2d 1162 (5th Cir. 1989), *petition for cert. filed*, 57 U.S.L.W. 3829 (June 5, 1989) (No. 88-2009)	15
Sams v. United Food & Commercial Workers Union, 835 F.2d 848 (11th Cir. 1988)	19, 25
Skipper v. Hoff & Associates, 684 F. Supp. 707 (S.D. Ga. 1987)	19

TABLE OF AUTHORITIES—Continued

	Page
Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944)	15
Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962)	20
United Steelworkers of America v. Dunbar, 446 U.S. 983 (1980)	7
Vaca v. Sipes, 386 U.S. 171 (1967)	10, 15
Wilson v. United Mine Workers, Cv. No. 78-G-1362-S (N.D. Ala., June 3, 1980)	19
Statutes	
Labor Management Relations Act of 1947, Section 301, 29 U.S.C. § 185	3
National Labor Relations Act of 1935, Section 9(a), 29 U.S.C. § 159(a)	3
Other Authorities	
Bureau of National Affairs, Basic Patterns in Union Contracts (11th ed. 1986)	19
M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION (1988)	19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR MICHAEL WAYNE JOHNSON, RUTH ELLEN JOHNSON AND JOHN RUSSEL JOHNSON; LAURA DUNBAR, AS GUARDIAN AD LITEM FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN AD LITEM FOR LESLIE D. WOOD,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

The United Steelworkers of America, AFL-CIO-CLC, hereby petitions for a writ of certiorari to enable this Court to review the judgment of the Supreme Court of Idaho in *Rawson, et al. v. United Steelworkers of America*, Case No. 15338.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reported at 115 Idaho 785, 770 P.2d 794, and is reproduced as Appendix A (1a-13a). That opinion was issued following an

order by this Court that granted a petition for certiorari in No. 86-908, vacated a prior judgment and remanded for further consideration in light of *IBEW v. Hechler*, 481 U.S. 851 (1987). See 482 U.S. 901 (1987).

The opinion of the Idaho Supreme Court that was vacated upon that petition for certiorari is reported at 111 Idaho 630, 726 P.2d 742. It is reproduced as Appendix B (13a-48a). An earlier unreported opinion, which was issued on February 24, 1986, and later withdrawn by the Idaho Supreme Court upon rehearing, is reproduced as Appendix C (49a-88a). The trial court opinion that was under review—the November 1, 1983, opinion of the District Court of the First Judicial District of the State of Idaho—is unreported. It is reproduced as Appendix D (89a-106a).

The Appendix also contains two decisions that were rendered at an earlier stage of proceedings in this case. The Idaho Supreme Court's opinion of September 13, 1979, is reported at 100 Idaho 523, 620 P.2d 21, and is reproduced as Appendix E (107a-160a). The Idaho trial court's opinion of January 29, 1976, is unreported; it is reproduced as Appendix F (161a-164a).

JURISDICTION

The opinion and judgment of the Supreme Court of Idaho were issued on December 22, 1988. A timely petition for rehearing was denied on April 19, 1989 (Appendix G, 165a-166a). On July 12, 1989, Justice Sandra Day O'Connor entered an order extending the time for filing a petition for certiorari to August 17, 1989 (Appendix H, 167a), and on August 9, 1989, Justice O'Connor entered an order further extending the time for filing a petition for certiorari to August 24, 1989 (Appendix I, 168a).

The federal questions presented in this petition were properly raised and were decided by both the trial court

and the Idaho Supreme Court (3a-8a, 30a-36a, 101a-106a). This Court has jurisdiction to review the judgment below by certiorari pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Section 9(a) of the National Labor Relations Act of 1935, as amended, 29 U.S.C. § 159(a), provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The Sunshine Mining Company operates a silver mine in Kellogg, Idaho, known as the Sunshine Mine. The United Steelworkers of America ("the union") is the exclusive bargaining representative of miners working in the Sunshine Mine.

The collective bargaining agreement between the company and the union defines a limited role for the union in relation to the safety of employees, in Article IX, entitled

"Safety and Health." That article, as it stood at the time relevant to this case, is reproduced in full as Appendix J to this petition (169a-171a). The article began by acknowledging the employer's responsibility for the safety and health of its employees: "The Company shall continue to make reasonable provisions for the safety and health of its employees at the plant during the hours of their employment" (169a). The article provided for a safety committee composed of six members, three designated by the employer and three designated by the union. It defined the function of the safety committee as "to advise with the Plant Manager concerning safety and health matters" (170a). The article permitted the union to designate a representative to "accompany" the company's safety engineer once each month on "a tour of a section of the mine," with the results of the tour to be considered at the next meeting of the safety committee (171a). A union member of the committee was also permitted to "accompany" the State Mine Inspector on any State inspection made at the property (*id.*). The agreement made clear that the safety committee had no authority to change safety practices in the mine; it could only submit "advices," "suggestions [and] recommendations" to the plant manager "for his consideration and for such action as he may consider consistent with the Company's responsibility to provide for the safety and health of its employees . . . ." (170a-171a) The union did not even have recourse to the grievance procedure unless a majority of the "entire" safety committee (necessarily including at least one management member) had concurred in a recommendation which "need[ed] action immediately" but was not carried out (171a). Apart from this article, the agreement contained no other provisions regarding safety and health.

On May 2, 1972, a major fire occurred underground in the Sunshine Mine. Ninety-one miners died from asphyxiation or carbon monoxide poisoning. After a thorough investigation, the United States Bureau of Mines concluded that the most likely cause of the fire was spontaneous

combustion of timbers and debris in an area that had long before been worked out and walled off from the rest of the mine.

The families of the deceased miners collected workmen's compensation payments from the company under Idaho law. A number of the families then filed suit seeking additional damages from various third parties, including the United States Bureau of Mines and the manufacturers of certain materials and equipment that had been used in the mine. *See House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978). Four of the families sued the union in the state courts of Idaho, thus initiating the lawsuit that is the subject of this petition.[1]

The sole basis for respondents' claims against the union was alleged negligence in administering and enforcing the Safety and Health article of the collective bargaining agreement. Specifically, the complaint alleged that the union

> undertook to act as accident prevention representative and enforcer of the Company-Union agreement and did it negligently, to wit:
>
> A. It misrepresented its safety concern and expertise to the rank and file.[2]

---

[1] The four respondents, all widows of deceased miners or guardians of minor children of the deceased miners, sued variously in their individual capacities and on behalf of the children. The capacity in which each respondent brings the suit is identified in the caption of this petition.

These families also sued the State of Idaho in this case, alleging that the state's mine inspectors had negligently failed to identify the hazards. Those claims were dismissed in earlier proceedings in this case (117a-154a).

[2] The Idaho courts dismissed on state-law grounds the misrepresentation part of this claim, along with a similar fraud claim based on allegations that the union had falsely represented that it possessed expertise on safety matters and had thus lulled the miners into reliance on its safety "inspections." (8a-9a, 16a-18a).

B. It failed to develop adequate safety programs for its union membership.

C. It undertook to provide representatives who inspected and pretended to enforce the contractual accident prevention clauses, and did so negligently, to wit:

(1) It failed to require mine evacuation on first evidence of smoke underground;

(2) It failed to require fire drills;

(3) It failed to require personal protective equipment;

(4) It failed to require adequate protection against spontaneous combustion of discarded timbers underground;

(5) It failed to require adequate emergency egress from the mine.

At an early stage of the proceedings, the union moved for dismissal or summary judgment on federal preemption grounds. In 1976 the Idaho trial court granted the motion for summary judgment (164a). The court ruled that respondents' claims were based entirely on the manner in which the union had carried out its function of representing its members, that the federal duty of fair representation exclusively defined the terms on which a union could be held liable in that capacity, and that negligence was not a permissible ground for such liability (163a-164a). Accordingly, the trial court dismissed the complaint (164a).

On appeal, the Supreme Court of Idaho reversed (108a).[3] A "special concurrence" (joined by three members of the five-member court) stated that "the precise

[3] The Idaho Supreme Court's opinion is reproduced in full as Appendix E. Most of that lengthy opinion is devoted to respondents' claims against the State of Idaho. The portion of the majority opinion that addresses the claims against the union and a special concurring opinion on union liability appear at 109a-116a, 155a-156a.

nature of the legal issues raised by the appellants' wrongful death action is not entirely clear at the present procedural posture of the case," and "a final decision whether the wrongful death action against the respondent union is preempted by federal labor laws must therefore await a full factual development of the legal issues raised under our state tort law" (156a). The union's petition for certiorari was denied. *United Steelworkers of America v. Dunbar*, 446 U.S. 983 (1980).

On remand, after completion of extensive discovery in the trial court, the union again moved for summary judgment, arguing that on the undisputed facts the union could not be held liable under either federal labor law or Idaho tort law. In 1983 the trial court again granted the union's motion, primarily on grounds of Idaho tort law (97a-100a). In the alternative, on the issue of federal preemption, the trial court ruled that the summary judgment record made it clear that respondents' negligence claims against the union were based solely on the union's "representational duties" and "the manner in which the Union carried out the collective bargaining agreement" (103a-104a). The trial court therefore "respectfully request[ed] the [Idaho] Supreme Court to re-examine its holding that this case is not pre-empted by federal labor law" (106a).

On appeal the Idaho Supreme Court reinstated respondents' negligence claims (15a-16a).[4] In addressing the Idaho tort law issues, the court *assumed* that the safety and health article meant that the union "had contracted to inspect . . . the mine" (29a). The court accordingly characterized the union's exercise of its contractual right to "accompany" the employer's safety engineer or the

[4] The Idaho Supreme Court initially affirmed the trial court's judgment of dismissal on principles of Idaho tort law, without reaching the issue of federal preemption (49a-55a). Respondents then petitioned for rehearing, and the Idaho Supreme Court rendered the decision described in text.

state inspector as "*in fact*, inspect[ing] the mine" (*id.*; emphasis in original). And, on these premises, the Idaho Supreme Court concluded that under Idaho law the asserted failures of the union to discover dangerous conditions or to request that the employer improve those conditions could, if proved negligent, constitute an actionable tort.

The Idaho Supreme Court then held that respondents' tort claims were not preempted by federal labor law. The court first rejected the union's argument that the federal duty of fair representation exclusively defines the grounds upon which a union can be held liable for the manner in which it carries out the function of representing its members (30a-31a). Second, although the court acknowledged that "the nature and scope of the Union's duty" were defined by the safety provisions of the collective bargaining agreement (33a), the court nonetheless concluded that "the provisions of the collective bargaining agreement do not require interpretation" and thus distinguished this Court's decision in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985) (33a).

In concluding that federal law does not preempt respondents' claims, the Idaho Supreme Court relied heavily on the Eleventh Circuit's decision in *Hechler v. IBEW*, 772 F.2d 788 (11th Cir. 1985)—a decision which this Court later reversed in *IBEW v. Hechler*, 481 U.S. 851 (1987). The Idaho Supreme Court quoted extensively from the Eleventh Circuit's opinion in *Hechler*, stated that the *Hechler* court "correctly analyzed the nonapplicability of the preemption doctrine to cases of this nature" (34a), and concluded: "We agree with the *Hechler* analysis" (36a).

The union petitioned for certiorari while *Hechler* was pending in this Court. After reversing the Eleventh Circuit's ruling in *Hechler*, this Court granted the petition, vacated the Idaho Supreme Court's judgment, and remanded "for further consideration in light of" *Hechler*. 482 U.S. 901 (1987).

On remand, the Idaho Supreme Court "adhere[d] to [its prior] opinion as written" (8a). However, the court no longer acknowledged, as it had prior to *Hechler*, that "the nature and scope of the Union's duty" were defined by the collective bargaining agreement (33a). Instead, it concluded that "the standard of care is imposed by state law without reference to the collective bargaining agreement" (4a). The court ignored the union's consistent argument that it was not authorized to "inspect" the mine under the Safety and Health article and had not done so, and that the exact scope of its activities and duties under that article could only be determined through an interpretation of the collective bargaining agreement. Instead, the court repeatedly stated that the union had "conceded [that it] undertook to inspect" the mine and that "the issue is solely whether that inspection was negligently performed under traditional Idaho tort law." (5a; see also 41, 61-81).

Two justices dissented. Justice Bakes wrote that the duty of fair representation was "the only duty which the union owed to its members" in "pursuing the members' rights under the collective bargaining agreement to correct unsafe working conditions in the mine" (11a). He also took strong issue with the majority's conclusory statement that the union had "conceded" that it undertook to inspect the mine:

> The union has never conceded that it undertook to inspect the Sunshine Mine. The Court's opinion does not point to any pleading or any evidence in the record to sustain either its factual conclusion that the union undertook to inspect the mine, or its statement that the union has "conceded" that it undertook to inspect. There is absolutely nothing to support either of those two statements.

(10a).

The other dissenting justice wrote that *Hechler* "requires us to hold that there is pre-emption." (11a).

> Except for any duty imposed by the collective bargaining agreement, the Union had no duty for the safety of its members. The existence of this duty and its nature and scope are dependent on the meaning of the collective bargaining agreement. In *Rawson I* this Court said that "the provisions of the collective bargaining agreement . . . determined . . . the nature and scope of the Union's duty." [111 Idaho] at 640, 726 P.2d at 752. I agree and for this reason would hold that *Hechler* applied.
>
> • • •
>
> Here, I am unable to see how a court could ascertain the duty of the Union without determining the meaning of the collective bargaining agreement. This would require the interpretation or construction of the collective bargaining agreement.

(12a).[5]

---

[5] Although the judgment of the Idaho Supreme Court contemplates further proceedings in the trial court, it is final within the meaning of 28 U.S.C. § 1257(a) because "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). *See also id.* at 485-86; *Hudson Distributors, Inc. v. Lilly*, 377 U.S. 386, 389 n.4 (1964). In this case plaintiffs have pleaded only a personal-injury claim based on allegations of negligence under Idaho law; they have steadfastly denied that their claim is based on the federal duty of fair representation and their complaint does not plead any of the elements of a breach of that duty as defined by this Court. *See, e.g., Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

REASONS FOR GRANTING THE WRIT

This case presents two issues, each of which independently merits the attention of this Court on certiorari. The first issue is whether the federal duty of fair representation preempts a state tort claim based on alleged union negligence in administering the safety provisions of a collective bargaining agreement. The second issue is whether the Idaho Supreme Court's decision, following remand for further consideration in light of *Hechler*, is inconsistent with the principles of that decision.

On each issue the Idaho Supreme Court's decision is in direct conflict with a decision of a federal court of appeals. Moreover, the presence of those conflicts alone does not reflect the true dimensions of the importance of this case. Simply put, the application of state tort law to the manner in which unions administer and enforce their collective bargaining agreements is inconsistent with the national labor policy. State tort law, unlike the duty of fair representation, would deprive unions of the necessary latitude to decide how best to serve the needs of the bargaining unit within the limits of their negotiating strength and other scarce resources. The prospect of enormous tort damage awards may well drive some unions to avoid negotiating contractual safety provisions altogether, with the counterproductive result that workers generally will be deprived of any representation with respect to workplace hazards. Finally, application of the highly individualized tort law of fifty different states is directly at odds with the federal interest in uniformity.

1. The beginning point for both questions presented by this petition is that the only conduct asserted here as a basis for state tort liability is the union's administration and enforcement of a collective bargaining agreement. This case requires a decision whether liability based on the union's performance of that function must be determined according to principles of federal labor law, rather than state tort law.

In Idaho, as elsewhere, it is the employer who has the responsibility under state law to provide a safe workplace.[6] The union has no independent duty under state law to police the employer's compliance with its safety responsibilities, nor could the state impose such a duty. Respondents' claim is based instead on the proposition that the union had assumed a duty by contract, and the Idaho Supreme Court similarly found a duty based on that contract and the union's administration of it.

The contract in question is the collective bargaining agreement between the employer and the union. The complaint on its face makes clear that the respondents' claims are predicated on this contract, and on the union's performance of its duty as representative of the employees to enforce this contract. Thus, the complaint states: the union "undertook to act as accident prevention representative and enforcer of the Company-union agreement and did it negligently." Complaint, quoted, supra, at 5-6. In particularizing this allegation of "negligence," the complaint goes on to allege a series of acts that the union "failed" to take: "[i]t failed to develop adequate safety programs for its union membership"; "[i]t failed to require mine evacuation on first evidence of smoke underground"; "[i]t failed to provide fire drills"; "[i]t failed to require adequate protection against spontaneous combustion of discarded timbers"; "[i]t failed to require adequate emergency egress from the mine." *Id.*

The complaint alleged only these failures to take affirmative action, all of which assume that the union had a duty to act. The complaint did not allege a single instance where, absent such a duty to act, the union negligently caused harm to the employees. Moreover, after the completion of discovery, the plaintiffs were still unable to point to a single instance where—assuming the

[6] *See Deshazer v. Tompkins*, 89 Idaho 347, 404 P.2d 604, 608 (1965); *Otto v. Mell*, 94 Idaho 109, 482 P.2d 84, 86 (1971).

contract did not place upon the union a duty to act—the union had negligently caused any harm.[7]

Upon review of this record, the trial court concluded (103a-104a):

> No matter how the plaintiffs couch their arguments, they are attempting to hold the defendant liable for conduct of an advisory safety committee created and defined by the collective bargaining agreement. The plaintiffs are complaining about the manner in which the Union carried out the collective bargaining agreement, essentially saying the Union advisory committee should have done more. This is obviously a question of the Union's representational duties and these representational duties are governed by the National Labor Relations Act.

The Idaho Supreme Court rejected that conclusion. It saw no difference between a claim for tort liability based on the manner in which the union represents employees under a collective bargaining agreement, and a claim for tort liability based on any other conduct (30a-31a).[8]

> No provision of the National Labor Relations Act provides that it is federal policy to immunize labor unions for their negligent acts.
>
> • • •

[7] After discovery had been closed, respondents attempted to resist the union's motion for summary judgment by asserting two additional allegations of failure to take affirmative action: the union's alleged failure to bargain for stricter safety provisions in the collective bargaining agreement, and the union's alleged failure to hire safety experts to serve as the union representatives on the safety committee (104a).

[8] The following passages are taken from the Idaho Supreme Court's opinion in September 1986, prior to *Hechler*. As noted above, however, after *Hechler* the Idaho Supreme Court considered petitioner's arguments based on *Hechler* and announced: "We . . . adhere to our opinion as written." (8a). Thus the pre-*Hechler* opinion and the post-*Hechler* opinion together constitute the court's explanation of its decision.

> We remain of the view expressed by the majority of this court in *Dunbar*, 100 Idaho at 527 [114a].
>
> > We are cited to no authority, for example, which insulates a union for its negligent and tortious conduct toward one of its members, *i.e.*, if a member of a union was struck by a motor vehicle owned by the union and operated by one of its officials during the course of his employment for the union, we cannot believe the union would be insulated from liability on the basis that the only duty it owed toward its members was that of fair representation. If a union's unreasonable conduct results in the death of one of its members, it should not be excused from liability because of the legal fortuity of its organizational status anymore than if its conduct brought death to a nonunion member.

The Idaho Supreme Court went on to find the basis for a tort duty under state law in the collective bargaining agreement and the union's activities under it (29a) (emphasis removed):

> Because the Union, pursuant to the provisions of the collective bargaining agreement, had contracted to inspect and in fact, inspected the mine, it owed the (minimal) duty to its members to exercise due care in inspecting and in reporting the findings of its inspection.

Then, after listing a number of safety hazards that were alleged by the respondents to have contributed to the miners' deaths, the Idaho Supreme Court explained how the union's actions, or failures to act, under the contract could support liability for negligence under state law (28a-29a):

> The Miners contend that most of these deficiencies could have been observed, and should have been observed, in the course of a reasonable inspection and, further, that recommendations could have, and should have, been made with regard to these deficiencies. A reasonable inference which the trial court should have drawn in favor of the miners is that inspecting personnel were negligent in not seeing and reporting some of those conditions.

It is therefore clear that the only conduct on which the Idaho Supreme Court predicated its conclusion that the union may be held liable under state tort law was the union's administration and enforcement of the safety and health article of the collective bargaining agreement.

2. This case thus presents the question whether under state tort law a union can be held liable for personal injuries that are alleged to have been caused by its negligence in the administration and enforcement of a collective bargaining agreement, or whether the federal duty of fair representation is the sole source of any union liability that could result from such conduct.

In a series of cases beginning with *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944), this Court has defined the duty of fair representation that unions owe to members of the bargaining units for which they are the exclusive representatives. In *Vaca v. Sipes*, 386 U.S. 171 (1967), the Court held that the union's duty of fair representation governs its conduct in negotiations "and in its enforcement of the resulting collective bargaining agreement." *Id.* at 177. The duty requires the union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Id.* The Court further held that federal law exclusively governs the determination whether a breach of this duty has occurred. *Id.*

After *Vaca* the law has generally been well settled that the duty of fair representation preempts any use of state law to impose a different standard of conduct on a union for the manner in which it represents members of its bargaining unit. *E.g.*, *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292, 301 (1971); *Richardson v. United Steelworkers of America*, 864 F.2d 1162,

1166-67 (5th Cir. 1989), *petition for cert. filed*, 57 U.S.L.W. 3828 (June 5, 1989) (No. 88-2009); *Bache v. American Telephone & Telegraph Co.*, 840 F.2d 283, 285-86 (5th Cir.), *cert. denied*, 109 S. Ct. 219 (1988); *Jones v. Truck Drivers Local Union 299*, 838 F.2d 856, 860-61 (6th Cir. 1988); *Johnson v. United Food & Commercial Workers Local 23*, 828 F.2d 961, 967 (3d Cir. 1987); *Peterson v. Air Line Pilots Ass'n*, 759 F.2d 1161, 1168-70 (4th Cir.), *cert. denied*, 474 U.S. 946 (1985); *Maynard v. Revere Copper Products, Inc.*, 773 F.2d 733, 735-36 (6th Cir. 1985).

The Idaho Supreme Court's decision in this case, however, carves out one subject of union representational activities—safety—and imposes on the union, in addition to the federal duty outlined by this Court in *Vaca*, a duty of "due care" under state tort law. That decision conflicts in the squarest possible way with the decision of the United States Court of Appeals for the First Circuit in *Condon v. Local 2944, United Steelworkers of America*, 683 F.2d 590 (1st Cir. 1982). In *Condon* an employee was injured on the job and sued his union for negligence. As here, the basis for his claim was the union's activities under the safety and health article of its collective bargaining agreement. That article, in terms virtually identical to the safety and health article in this case, created a joint safety and health committee to "advise with the Company concerning safety and health matters."[9] 683 F.2d at 591 n.1. As here, the plaintiff alleged that the union had "fail[ed] to properly inspect the working premises for safety hazards and to remove those hazards." *Id.* at 592. And, as here, the plaintiff argued that the union "under[took] to fulfill a safety monitoring

[9] The virtual identity of these provisions of the two contract articles, *compare* 683 F.2d at 591-92 *with* 169a-171a, is not a coincidence. The union in both cases was the Steelworkers, and both articles in this respect generally followed the model provisions recommended by the United Steelworkers of America to its local unions.

function" and could be held liable under state law if it failed to exercise reasonable care in performing that function. *Id.* at 594.

The First Circuit held that Condon's claim was preempted by federal law. It rejected Condon's argument that the state-law duty of reasonable care "arose independent of [the Union's] obligations under the collective bargaining agreement," *id.*, and held that Congress had occupied the entire field of defining a "union's rights and duties as the exclusive bargaining agent in carrying out its representational function" and had "closed it to state regulation." *Id.* at 594-95. The court therefore affirmed a summary judgment that dismissed the plaintiff's claims.

The question on which these decisions are in conflict was presented in *Hechler* but the Court did not reach it. Justice Stevens argued in a separate opinion that the issue should have been reached and should have been decided in favor of preemption.

> Respondent has alleged nothing more than a breach of the Union's federal duty of fair representation. She has not alleged that the Union breached any specific promise made to her, and her argument that Florida law has augmented the Union's representational duties is plainly pre-empted by federal law.

481 U.S. at 865 (Stevens, J., concurring in part and dissenting in part).

This Court should grant the writ and address the issue in this case because it is an important issue of federal law. The federal duty of fair representation has been carefully developed, consistent with national labor policy, to give unions the latitude they need to "balanc[e] individual and collective interests" and determine for themselves what is in the best interest of "the bargaining unit as a whole." *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728, 742 (1981). That policy recognizes that unions are often confronted with competing

demands on scarce resources and limits on their bargaining power, so that they cannot always satisfy all of the legitimate objectives of the bargaining unit. *See, e.g., Ford Motor Co. v. Huffman*, 345 U.S. 330, 337-39 (1953). The duty of care, which has developed under state tort law for different purposes, does not accommodate these concerns. If Idaho law, for example, may impose on the Steelworkers millions of dollars in tort liability, based on plaintiffs' allegations that the union failed to hire safety experts or otherwise devote more resources to "inspecting" the Sunshine Mine, the union and its members will not remain free to set their own priorities through democratic processes; the union will be forced, if it undertakes any safety activities at all, to make a major commitment of resources to guard against possible tort liability.

Some unions will protect themselves against that liability by electing *not* to bargain for safety committees or safety clauses in their collective bargaining agreements. Such safety programs are often an important front-line protection against unsafe or unhealthy conditions. If unions drop out of such activities, workers will lose this collective protection and will be left to depend entirely on sporadic on-site visits from chronically understaffed government agencies. Such a result would "not serve the interest of [employees] and would retard rather than advance the goals of the National Labor policy." *Bryant v. United Mine Workers*, 467 F.2d 1, 5 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973).

The widespread assertion of such claims against unions is not merely hypothetical, but is a very real concern. Recent years have seen increasingly frequent attempts by employees injured on the job to bring state tort-law suits against unions for alleged negligence in performing (or failing to perform) safety inspections under collective bargaining agreements. Over 60 percent of collective bargaining agreements covering manufacturing employees contain provisions establishing a joint labor-management

safety committee.[10] Because workers' compensation awards generally are the exclusive means by which an employee injured on the job may recover from his employer, and because the dollar amounts of such awards pale in comparison to the large sums awarded by juries in tort actions, it has become almost commonplace for an injured worker to sue third parties in hopes of recovering the large amounts of tort damages that he cannot recover from his employer. Increasingly, unions with safety and health clauses in their collective bargaining agreements have become the targets of these third-party actions, and the stakes are extremely high.[11]

---

[10] Bureau of National Affairs, Basic Patterns in Union Contracts, at 127 (11th ed. 1986).

[11] *See, e.g., Sams v. United Food & Commercial Workers*, 835 F.2d 848 (11th Cir. 1988); *Condon v. Steelworkers Local 2944*, 683 F.2d 590 (1st Cir. 1982); *Bryant v. Mine Workers*, 467 F.2d 1 (6th Cir. 1972), *cert. denied*, 410 U.S. 930 (1973); *Skipper v. Hoff & Associates*, 684 F. Supp. 707 (S.D. Ga. 1987); *Pockalny v. Elwell Parker Elec. Co.*, 608 F. Supp. 570 (W.D.N.Y. 1985); *Preisler v. Steelworkers*, No. N-83-159 (D. Conn., Feb. 24, 1984); *Burgess v. Allendale Mut. Ins. Co.*, 111 L.R.R.M. 2997 (S.D. Ga. 1982); *Mahoney v. Chicago Pneumatic Tool Co.*, 111 L.R.R.M. 2839 (W.D. Mich. 1982); *Wilson v. United Mine Workers*, Cv. No. 78-G-1362-S (N.D. Ala., June 3, 1980); *Globig v. Johns-Manville Sales Co.*, 486 F. Supp. 735 (E.D. Wis. 1980); *Hartsfield v. Seafarers Int'l Union*, 427 F. Supp. 264 (S.D. Ala. 1977); *House v. Mine Safety Appliances Co.*, 417 F. Supp. 939 (D. Idaho 1976), *aff'd in part and rev'd in part on other grounds*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *McColgan v. Mine Workers*, 124 Ill. App. 3d 825, 464 N.E.2d 1166 (1984), *cert. denied*, 470 U.S. 1051 (1985); *Helton v. Hake*, 564 S.W. 2d 313 (Mo. App.), *cert. denied*, 439 U.S. 959 (1978); *Brooks v. New Jersey Manufacturers Ins. Co.*, 170 N.J. Super. 20, 405 A.2d 466, *certif. denied*, 81 N.J. 413, 408 A.2d 806 (1979); *Carollo v. Forty-Eight Insulation, Inc.*, 252 Pa. Super. 422, 381 A.2d 990 (1977); *Gerace v. Johns-Manville Corp.*, 95 L.R.R.M. 3282 (Pa. Ct. C.P. 1977), *aff'd* 337 Pa. Super. 634, 487 A.2d 442 (1984); *Higley v. Disston*, 93 L.R.R.M. 2443 (Wash. Super. 1976); M. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 406-10 (1988).

The federal policy favoring uniformity also would be undermined by the Idaho Supreme Court's decision. Many unions, like the Steelworkers, regularly enter into master agreements that cover all of an employer's workplaces throughout the country. If the decision of the Idaho Supreme Court were allowed to stand, a union that engaged in identical conduct in administering and enforcing identical contractual provisions would not be subject to the same rules of liability or standards of conduct everywhere. Instead, the risk of liability would vary from state to state depending upon the idiosyncracies of tort law in each state. The disruption of federal policy that this Court described in *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95, 103-104 (1962), would equally occur here:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

The decision below likewise would undermine the federal interest in uniformity as among different subjects that unions address in representing employees. On every other subject, including such subjects as seniority, pensions and fringe benefits, severance payments, and discharge and discipline, unions are held to one standard of conduct, as defined by the federal duty of fair representation—a standard that does not allow for the imposition

of liability for failure to exercise "due care."[12] But where workplace safety is concerned, union conduct would be governed by the highly individualized tort law duties adopted by each state. In this one area alone, unions would be deprived of the discretion which federal labor law and the duty of fair representation seek to guarantee, to deal as they and their members deem best with problems in the workplace.

In order to avoid this clash of state tort law with federal labor policy, this Court should grant this petition and review the judgment of the Idaho Supreme Court.

3. This Court should also grant the writ of certiorari because the Idaho Supreme Court's decision on remand is inconsistent with this Court's decision in *Hechler*. Indeed, the Idaho Supreme Court's most recent opinion, along with all of its other opinions in this case, displays an unremitting hostility to federal preemption.[13]

Before this Court decided *Hechler*, the Idaho Supreme Court acknowledged that "the nature and scope of the Union's duty" were defined by the safety and health provisions of the collective bargaining agreement (33a). In *Hechler*, this Court held that Section 301 preempted Hechler's state-law tort claim for that very reason:

> [A] court would have to ascertain, first, whether the collective-bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, *the nature and scope of that duty*, that is, whether

---

[12] See cases cited at pages 15-16, *supra*.

[13] Although this question is presented by the Idaho Supreme Court's decision, there would be no need to reach it if the Idaho Supreme Court were reversed on the first question presented. If the duty of fair representation precludes a state from holding a union to the duty of "due care" in administering the safety provisions of a collective bargaining agreement, there would be no occasion for further proceedings in this case.

> and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U.S., at 218.

481 U.S. at 862 (emphasis added). On remand, the Idaho Supreme Court sought to avoid that holding by changing its position that the plaintiffs' claims depended upon the collective bargaining agreement (5a):

> In the instant case we are not faced with looking at the Collective Bargaining Agreement to determine whether it imposes some new duty upon the union—rather it is conceded the union undertook to inspect and, thus, the issue is solely whether that inspection was negligently performed under traditional Idaho tort law.

As the dissent pointed out, however, there was no such "concession." (page 9, *supra*).

The force of preemption under *Hechler* cannot be avoided by pretending that it is unnecessary to interpret the collective bargaining agreement. The union never conceded that it was performing any safety activities other than those that the collective bargaining agreement authorized, and there was a major dispute between the parties over what the collective bargaining agreement authorized and also over what the union in fact was doing.

Respondents argued that the collective bargaining agreement created a duty to "inspect" the mine. The union argued that the collective bargaining agreement prescribed a more limited role.[14] It merely allowed the

[14] In its brief to the Idaho Supreme Court following the decision in *Hechler*, the union argued:

> The contract . . . nowhere describes the union's general safety functions as "inspections." The function of the Safety Committee is "to advise with the Plant Manager concerning safety and health matters," including to "[c]onsider existing practices and rules relating to safety and health, formulate suggested changes in existing practices and rules, and recommend adoption of new practices and rules." [*Rawson v. United Steelworkers*, 726 P.2d 742, 749 (Idaho 1986)]. The alleged provision for "inspection" consists merely of authority for a representative to "*accompany* the State Mine Inspector or his Deputy" on *State* inspections of the mine and once a month "to *accompany* the [company's] Safety Engineer on *tours* of the mine." *Id.* (emphasis added).[9]
>
> Appellants have contended that these contract provisions created a right, and therefore a duty, to inspect the mine. But the union's position is that these provisions did not give it the right, let alone the duty, to make *inspections* of the mine. Moreover, even if the Court were to focus on what the union safety committee was actually doing, it would be impossible to determine the scope of any duty the union had thereby assumed without reference to what had been agreed in the contract. As Justice Bakes observed in his dissent, the terms of the collective bargaining agreement "not only outlined the union's responsibilities in regard to the Safety Committee, but also limited the union's right to interfere in the operation of the mine." 726 P.2d at 764. If the question whether the union was entitled or obligated to "inspect" the mine had arisen in a dispute between the union and Sunshine Mine, federal law would govern the interpretation of the contract. The "need for federal uniformity in the interpretation of contract terms"

[9] The only use of the term "inspect" in connection with the union's activities appears in the separate section of the Safety and Health article that describes the procedure to be followed when an individual employee made a specific complaint that he was "being required to work under conditions which are unsafe beyond the normal hazards inherent in the operation in question . . . ." Art. IX § 2. It is undisputed that the inspections called for by this section in response to such complaints were wholly distinct from the unions' rights in relation to generalized conditions in the mine. *See* Dep. of Lavern Albert Melton, July 6, 1983, at 26-30.

union to name half of the advisory safety committee and to send a representative to "accompany" management's safety engineer on a monthly tour of some part of the

mine and to "accompany" the Idaho mine inspector on his periodic inspections (pages 3-4, *supra*; 169a-171a). It affirmatively "limited the union's right to interfere in the operation of the mine" (44a, Justice Bakes, dissenting). The union was even precluded from *filing grievances* over general safety conditions unless "a majority of the entire safety committee," necessarily including at least one management representative, had concurred in a recommendation which was not carried out (171a).

Given this dispute, the existence of any union duty to "inspect" and the scope of any such duty necessarily depends upon interpretation of the collective bargaining agreement. Thus, here, as in *Allis-Chalmers Corp. v. Lueck*, "the extent of [the] duty ultimately depends upon the terms of the agreement between the parties" and, as a consequence, the extent of the duty is "tightly bound with questions of contract interpretation that must be left to federal law." 471 U.S. at 215.

On this question, as well as on the preemptive effect of the duty of fair representation, the decision of the Idaho Supreme Court conflicts with decisions of federal courts of appeals. In *Michigan Mutual Ins. Co. v. United Steelworkers of America*, 774 F.2d 104 (6th Cir. 1985), the union was accused of negligence under state law in "perform[ing] safety services for its members." *Id.* at 105. Because the source of the union's asserted duties was the safety provision of the collective bargaining agreement, the Sixth Circuit held that the claim for "negligent performance of duties it voluntarily assumed," *id.*, was preempted by Section 301 under *Allis-Chalmers*.

---

compels application of the same federal law to interpret the agreement when the same issue arises in another context. *See Hechler*, 107 S. Ct. at 2168; *see also id.* at 2165. The preemptive effect of federal law cannot be avoided by assuming one disputed interpretation of the contract and using that interpretation as the cornerstone for liability.

Respondent's Supplemental Brief, Case No. 15338, at 13-15 (filed Sept. 23, 1987).

Id. See also Sams v. United Food & Commercial Workers Union, 835 F.2d 848 (11th Cir. 1988) (under *Hechler*, section 301 preempted state-law claim by injured employees that union had breached its "duty of care").

The question whether the Idaho Supreme Court's decision conforms to *Hechler* is important for this Court to resolve for the same reason that the first question presented by this case—the preemptive force of the duty of fair representation on matters of safety—is important to resolve. The use of state-law principles to interpret the safety articles of collective bargaining agreements would leave unions subject to varying standards of conduct in different states—even where there is a single nationwide contract—and would disrupt the careful balance of interests that the federal labor policy was designed to achieve.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted to review the judgment of the Supreme Court of Idaho.

Respectfully submitted,

BERNARD KLEIMAN
Suite 1910
One East Wacker Drive
Chicago, Illinois 60601

CARL FRANKEL
Five Gateway Center
Pittsburgh, Pennsylvania 15222

GEORGE H. COHEN
(Counsel of Record)
ROBERT M. WEINBERG
JULIA PENNY CLARK
BREDHOFF & KAISER
1000 Connecticut Ave., N.W.
Suite 1300
Washington, D.C. 20036
(202) 833-9340

FREDERICK V. BETTS
PAUL D. CAREY
JAMES D. NELSON
BETTS, PATTERSON & MINES
1215 Fourth Avenue
Seattle, Washington 98164

Attorneys for Petitioner